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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	CC Docket No. 99-68
Inter-Carrier Compensation	)	
for ISP-Bound Traffic	)	

COMMENTS OF KMC TELECOM INC.

KMC Telecom Inc. ("KMC"), by its undersigned counsel, submits these comments in response to the *NPRM* issued in this proceeding.[1] KMC is a competitive local exchange carrier ("LEC") providing facilities-based local telephone services, and is authorized to provide, through its subsidiaries, competitive local and long distance services in over 17 states and Puerto Rico. KMC has installed state-of-the-art networks in various cities within its operating territory, including Huntsville, Alabama; Melbourne, Florida; Savannah and Augusta, Georgia; Baton Rouge and Shreveport, Louisiana; Greensboro and Winston-Salem, North Carolina; Corpus Christi, Texas; Roanoke, Virginia; and Madison, Wisconsin. KMC soon will build or complete similar networks in several other cities in the Southeast and Midwest.

KMC submits that the Commission should establish a framework to govern intercarrier compensation for calls to Internet service providers ("ISPs") on a going-forward basis that is predicated on, and extends, the intrinsic aspects of the way in which this traffic currently is treated. For the most part, this framework relies on the ability of the parties to negotiate and, if necessary, to arbitrate intercarrier compensation arrangements for this traffic. At the same time,

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[1] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 and Inter-Carrier Compensation for ISP-Bound Traffic,* Declaratory Ruling and Notice of Proposed Rulemaking, CC Docket Nos. 96-98, 99-68, FCC 99-38, released February 26, 1999 ("*Dial-Up Order" or "NPRM*").

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KMC submits that those negotiations should occur within a framework of federal pricing guidelines that the Commission should adopt in this proceeding.

Those guidelines, in turn, should require or permit (1) compensation for calls to ISPs to be based on TELRIC; (2) the compensation rate to be symmetrical; (3) the rate to be based on ILEC costs (unless a CLEC can demonstrate higher costs); (4) the recovery of costs on a usage sensitive basis as consistent with other federal requirements; and (5) rates and requirements for calls to ISPs to be the same as rates and requirements for all other calls subject to reciprocal compensation.

ARGUMENT

I. CURRENT INTERCARRIER COMPENSATION ARRANGEMENTS FOR CALLS TO ISPs ARE THE PROPER FOUNDATION FOR ANY FUTURE FRAMEWORK

In the *Local Competition Order*,[2] the Commission established regulations to implement the local competition provisions of the Telecommunications Act of 1996 ("1996 Act")[3] including, *inter alia*, arrangements for reciprocal compensation under section 251(b)(5).[4] The regulations implementing Section 251(b)(5) permit local service providers to negotiate reciprocal

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[2] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No.96-98, First Report and Order, 11 FCC Rcd 15499, 15805-15806, paras. 694-606 (1996) (*Local Competition Order*), *vacated in part, aff'd in part*, Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part* AT&T Corp. v. Iowa Utils. Bd., 119 S.Ct. 721 (1999).

[3] Pub.L. 104-104, Title VII, Sec. 706, Feb. 8, 1996, 110 Stat. 153.

[4] 47 U.S.C. Section 251(b)(5).

compensation rates and arrangements subject to an opportunity to arbitrate before state commissions under Section 252.

Throughout these negotiations, the competing carriers ("CLECs") and incumbent carriers ("ILECs") assumed that the reciprocal compensation provisions of the Act and their interconnection agreements applied to all local traffic, including calls to ISPs. It was not until the ILECs discovered that the balance of inter-carrier compensation did not flow markedly in their direction that they began to argue against compensation for calls to ISPs. Their post-hoc arguments did not comport with the facts, and all state commissions to have considered the issue prior to the release of the *Dial-up Order* ruled that calls to ISPs were subject to reciprocal compensation.

Thus, for a period of several years following passage of the Act, the Commission's reciprocal compensation framework generally was applied to calls to ISPs. In the *Dial-Up Order*, however, the Commission noted for the first time that, given the jurisdictional nature of such calls, the rules governing reciprocal compensation did not apply to ISP-bound traffic. More importantly, the Commission conceded that there were ***no*** federal rules in place governing that traffic. However, noting its long-standing treatment of ISPs as end-users and ISP-related traffic as local, the Commission observed that state commissions had properly stepped into the void, and it endorsed the decisions of those state commissions as a reasonable exercise of their authority that did not interfere with any federal rules.

Thus, notwithstanding the reluctance, sometimes extreme, of some ILECs to compensate CLECs for calls to ISPs as required by their contracts and by numerous state commissions, the present system of negotiation and/or arbitration, combined with the ability of carriers to "opt-in"

to previously approved agreements, did establish rates. The range of inter-carrier compensation arrangements, from "bill-and-keep" to reciprocal compensation, and the range of rates paid for transporting and terminating traffic demonstrate the effect of the current system.

The current system also is effective because of the nature of the traffic. The characteristics of telecommunications traffic between an end user and an ISP are no different from any other type of local exchange telecommunications traffic. ISPs are not the only businesses with large amounts of incoming traffic and longer-than-usual hold times. For example, customer service centers, catalogue operations and ticket agencies generally have similarly large imbalances of incoming to outgoing calls and longer than usual hold times. These calls are not treated differently because those characteristics are meaningless in the context of compensation arrangements. The same result should apply for calls to ISPs because they are handled and delivered the same as any other local call.

In addition, while negotiation is the preferred method of determining compensation arrangements and rates, arbitration provides an essential check on the tendency of ILECs to flex their market muscle by insisting on unreasonable and anti-competitive arrangements, terms and conditions. CLECs are entirely dependent on interconnection with ILEC networks in order to function as viable local service providers. Experience also has shown that, without arbitration or some form of regulatory oversight, ILECs will engage in unilateral self-help to prevail in their self-serving points-of-view concerning, among other items, intercarrier compensation for ISP-bound traffic.[5]

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[5] BellSouth and Ameritech both announced in the summer of 1997 that they simply had decided to stop compensating CLECs for calls to ISPs.

KMC submits, therefore, that the Commission should adopt this framework in the present rulemaking proceeding. Accordingly, the Commission should rule that parties may negotiate intercarrier compensation arrangements for ISP-bound traffic as they negotiate all other interconnection arrangements, subject to an opportunity to arbitrate unresolved issues before regulators.

II. STATE COMMISSIONS SHOULD CONDUCT ANY ARBITRATIONS NEEDED TO RESOLVE DISPUTES OVER INTER-CARRIER COMPENSATION ARRANGEMENTS AND RATES

KMC also urges the Commission to rule that, in the event the parties are not be able to negotiate such compensation arrangements, then any arbitration of those issues should take place before state authorities just as carriers now are able to arbitrate all other provisions of their interconnection agreements under Section 252 of the Act. As KMC noted before, the characteristics of ISP traffic are no different than other forms of local exchange traffic, so there is no need to create a separate arbitration framework when state commissions have shown themselves perfectly capable of arbitrating ILEC/CLEC issues. State authorities have been conducting arbitrations since the passage of the Act and most, if not all of the state commissions now have procedural rules in place. Accordingly, the implementation of a federal arbitration program that exists separate and apart from the existing state programs would be a misapplication of limited federal resources. To be sure, the Act permits the Commission to arbitrate an interconnection dispute if a state commission refuses to do it, and the Commission should adopt the same posture here – permitting the parties first to arbitrate a compensation dispute before a state commission and then only acting if the state commission refuses.

III. THE COMMISSION SHOULD SET GUIDELINES FOR STATES TO FOLLOW IN ARBITRATING INTER-CARRIER COMPENSATION DISPUTES

At the same time, however, KMC believes that the Commission can, and should, assure that the goals of the Act are met uniformly and consistently by establishing guidelines for states to follow in the arbitrations they conduct. This would permit state authorities to set rates and other compensation-related arrangements in arbitrations requested by parties pursuant to federal guidelines. The Commission's authority for this process, as well as much of the groundwork, is found in the Commission's *Local Competition Order*.[6] It is a natural, and reasonable, extension of the guidelines set out in that order for the Commission to adopt federal rules for states to follow in arbitrating disputes regarding compensation for calls to ISPs carried by two or more local exchange carriers. KMC further submits that the rules governing the arbitration of disputes over inter-carrier compensation for calls to ISPs should be the same as those already established for reciprocal compensation for the transport and termination of local exchange traffic generally.

Under the same notion of a single rate for the same functionality, calls to ISPs should be subject to the same compensatory regime as all other local exchange traffic. Thus, KMC also urges the Commission to conclude that there should be a single inter-carrier compensation rate that would cover ***all*** local exchange traffic, including traffic bound for ISPs. To date, most, if not all, state commissions already set such inter-carrier compensation rates when they set reciprocal compensation, or transport and termination, rates. There is no reason to believe that ISP-bound traffic probably was not included in ILEC cost studies used to set reciprocal compensation rates – ILECs have always treated calls to ISPs as local for all purposes – there is no reason to set

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[6] *Local Competition Order* at ¶¶ 53, 60.

different compensation rates, one rate for calls to ISPs and another rate for all other local calls. Thus, the reciprocal compensation rates previously set should be presumed to be applicable to the compensation for the delivery of all calls, including those to ISPs.[7]

Just like reciprocal compensation rates, the rates for inter-carrier compensation for calls to ISPs should be set at ILEC cost and should be symmetrical. The Commission already has considered the arguments regarding costs and symmetry for the transport and termination of local telecommunications and concluded that it was "reasonable to adopt the incumbent LEC's transport and termination prices as a presumptive proxy for other telecommunications carriers' additional costs of transport and termination."[8] As with reciprocal compensation for other local traffic, inter-carrier compensation for calls to ISPs should be subject to the same presumption that ILEC costs also reflect CLEC costs. A CLEC, however, should be permitted to submit evidence to rebut the presumption and to demonstrate that its costs are higher than ILEC costs.[9]

KMC urges the Commission to reject any argument for adopting flat rate charges for inter-carrier compensation for calls to ISPs. There is no functional difference between calls to ISPs and calls to any other end users. Thus, if reciprocal compensation rates are set on a per-

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[7] As the Commission decided in the *Dial Up Order*, state commissions have the authority to decide, if they have not already done so, whether reciprocal compensation provisions in existing interconnection agreements are applicable to calls to ISPs. If those commissions conclude that those provisions are applicable to ISP-bound traffic, then carriers should continue to be subject to those provisions until those agreements expire.

[8] *Local Competition Order* at ¶ 1085.

[9] *See Id.* at ¶ 1089.

minute basis on the grounds that they are usage sensitive, then there are equally compelling reasons to set inter-carrier compensation rates for ISP calls on a per-minute basis as well.

IV. COMPETING CARRIERS SHOULD BE ALLOWED TO OPT-IN TO EXISTING INTERCONNECTION AGREEMENTS AND TO OBTAIN THE BENEFITS OF THAT AGREEMENT FOR THE BALANCE OF THE TERM REMAINING

Finally, the Commission sought comments on whether parties should be able to opt-in to interconnection agreements pursuant to Section 251(i)[10] and to reset the term for that interconnection agreement so that it runs for its full term from the date of the opt-in.[11] KMC urges the Commission to affirm strongly the rights of new entrants to opt-in to existing interconnection agreements, or portions thereof, pursuant to Section 252(i). KMC submits that the Commission should permit new entrants to opt-in to existing agreements for the balance of the term of such agreements. This approach would best balance the interests of ILECs and the rights of CLECs under Section 252(i).

CONCLUSION

The Commission should allow carriers to reach agreement on inter-carrier compensation for ISP-bound traffic through negotiation. In the event that the parties fail to agree on such compensation, state commissions should arbitrate the disputed issues. The Commission should establish federal guidelines for these state commission arbitrations, and the guidelines should be substantively the same as the guidelines for reciprocal compensation for local traffic. KMC

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[10] 47 U.S.C. Section 252(i).

[11] *NPRM*, para. 35.

respectfully requests the Commission to adopt the recommendations set forth in these Comments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Carolyn W. Shaw, hereby certify that on this 12th day of April 1999, copies of the foregoing Comments of KMC Telecom, Inc. were delivered by hand to the following:

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